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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 967

CHICAGO AND NORTH WESTERN
RAILWAY COMPANY,
Petitioner,

vs.

ARTHUR J. RIEGER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT, ARTHUR J. RIEGER, IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

An adequate reference to the opinions delivered in the courts below is made in the Petition.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

1. Did the evidence make an issue of negligence for the jury?

2. Did defendant receive a fair trial particularly with respect to its claim that it was uninformed as to the claims of negligence?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There is no constitutional question involved and there are no other statutes involved other than as set forth in the Petition.

STATEMENT OF THE CASE

The action arises out of a serious and permanent injury sustained by plaintiff on November 29, 1960, in an accident while plaintiff was working as a bridge and building carpenter in the employ of defendant railway company.

This accident was a relatively uncomplicated matter and there was little, if any, dispute as to the facts. This is what happened as far as the actual outward and visible occurrence of the accident and injury are concerned. One end of a bridge stringer was being lifted by a "power crab." (R. 10). The lift was made to slide the other end on a push car which was attached to the power crab. (R. 10). The stringer slid about twelve inches and then swung out. (R. 10). Appellee was next to the stringer to guide it. (R. 9). The stringer swung in a fashion such as the foreman had "never seen a timber swing like this," and

neither "I (the foreman) nor anyone else out there expected this timber to swing as it did." (R. 33). Appellee's leg was caught between the swinging stringer and another stringer piled near the track. (R. 11).

On the day the appellee was injured which was November 29, 1960, he was a member of an eight man crew including the foreman. (R. 8). There was ice and snow on the ground at the time. (R. 20). There had been a bad snow, sleeting, icing and freezing. (R. 22). The stringers were icy. (R. 11). Their work at the point of the accident would have taken about a day and a half. (R. 33). The accident happened when the very first bridge stringer was being loaded. (R. 9). The bridge stringers are twenty-eight feet long and weigh about thirteen hundred pounds. (R. 54 and 56). There were no cinders or sand with the crew nor were any cinders or sand spread out where the day and a half's work was to have been done. (R. 33). There were no cinders or sand with the crew for its use. (R. 33). Rollers or skids were used in the past to slide stringers but the crew was not using rollers or skids the day of this accident. (R. 33). One member of the crew, Kenneth Bock, was operating the so-called "power crab." (R. 64 and R. 57). Four members of the crew including appellee were handling the stringer. (R. 26). The other three members of the eight man crew were at the scene of the accident and two were shovelling snow and one's activities are unaccounted for. (R. 10 and R. 26). If the snow hadn't been there, there would have been a full crew to slide the stringers. (R. 14). The "power crab" was equipped with a holding device which operates by turning down a lever. (R. 32). The foreman had instructed his men to have the holding device on tight when lifting as was being done at the time of this accident. (R. 33). On the particular occasion before the lift was made prior to this accident, the foreman took no steps to see whether the lock-

ing device was on or not. (R. 33). According to a professor of mechanical engineering from the University of Minnesota, one of the purposes of the device was, "to hold the boom in a particular position to prevent its swinging when stationary." (R. 37). If the lock is properly adjusted and applied, it will resist rotation due to exertion of a side force. (R. 40). An expert witness called by appellant testified the purpose of the collar was to "retard or slow down the sideways swinging of the boom to permit safe operation." (R. 51). At the time of this accident, the loading was on a curve where the south rail was higher than the north rail and appellant's foreman feels that that was a cause of the stringer swinging as it did. (R. 56). The intention was to lift the east end of the stringer so that it would slide westerly on the push cars. (R. 26). The timber was lifted about two feet and slid about twelve inches and then the full pressure started and appellee "couldn't hold myself no more." The pressure came right against appellee and he realized he couldn't hold it and attempted to escape the sideways swinging of the stringer. (R. 10). He didn't actually slip but it pushed him on the ice and it came so fast he couldn't hold it and he tried to "take off as fast as I could," but he couldn't get away. (R. 10). The other worker on his end of the stringer also tried his best to hold it but they couldn't hold the stringer. (R. 10). Appellee told his doctor that he was injured when he slipped on the ice when the stringer began to slide. (R. 20). The boom never before swung out as it did in this case. (R. 31). The foreman of the crew had never seen a timber swing like this. (R. 33). The crane operator testified that the locking device was applied at the time the boom swung sideways. (R. 53 and R. 56). The swinging stringer still attached to the swinging boom struck appellee's leg and his leg was caught between the swinging stringer and another stringer which was piled alongside the track. (R. 11).

Appellee has an eighth grade education and has done nothing but heavy manual labor all of his life. (R. 12 and 13). He is permanently disabled from the duties of a bridge and building carpenter (R. 45) and from any heavy manual labor. (R. 18). He may need further surgery. (R. 19). He has not done any work for the Railroad or anybody else since the accident and has spent much time in hospitals since the accident. (R. 12).

ARGUMENT

1. There Was Sufficient Evidence of Negligence.

We do not feel that this should be the time or place to argue fact issues but we are compelled to do so because of statements in the Petition which are not the fact. The Petition (p. 11) reads "plaintiff, who was in charge of an operation, with everything commonly done being followed as it had in the past without adverse consequences; and no specific act or omission, nor sufficiency of equipment, can be pointed out as being remiss." This can best be answered by quoting from the opinion of the Circuit Court of Appeals on these points. (Petition p. 25).

First as to plaintiff being in charge. "He was not the foreman." and "In the present case it would be of no particular significance that the appellee knew of the condition because he had to work in the dangerous area and he doesn't assume the risk of his employment."

Secondly as to there being no evidence of negligence. There was a locking device to hold the boom on the crane or crab from swinging sideways. All witnesses testified that the boom swung "as it never swung before." The foreman of the crew testified "neither I nor anyone else out there could have expected this timber to swing as it did and

I have never seen a timber swing like this." (R. 33). Either the brake was not applied by the crane operator or else if it was applied it failed to hold. The ground was icy. No cinders or sand had been spread. Only four men of the eight man crew were engaged in guiding the 1,300 pound timber. There was insufficiency of equipment and of help. The foreman who directed the loading felt that loading on a curve with one rail lighter than the other may have been a causative factor (R. 56). Rollers or skids had been used at other times to assist in sliding bridge timbers but none were available or in use at the time of this accident. (R. 59).

There was ample evidence of specific acts of negligence and when coupled together presented ample evidence of negligence on the part of the railway company. In fact it is difficult to imagine what other possible cause there could be of the accident other than these referred to. Had the railway taken these precautions there surely would have been no accident.

2. Defendant Was Fully Informed in Advance of Trial of Plaintiff's Claims and Defendant Received a Fair Trial.

As to the claim that plaintiff's counsel was permitted to define the issues, clearly in every case counsel has the right and the duty to present his client's claim. This was done. There is no claim of misconduct and the Petition specifically states (p. 10) "no misconduct was claimed."

How then could there be any possible error?

In *Norfolk & W. R. Co. v. Trautwein*, 111 F.2d 923, the complaint (Petition) was read and the jury told to determine if the railway was negligent "as charged in the

Petition." This is the identical situation except the claims of negligence were verbal to the jury by plaintiff's counsel rather than itemized in the complaint.

The charge to the jury was complete and adequate and as was said in *Rogers* v. *The Marshall*, 68 U.S. 644, 1 Wall. 644, 17 L. Ed. 714, "A nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious and cannot mislead the jury."

Counsel cites *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 64 S. Ct. 599, which is constitutional and banking law case and is in no way comparable to the case at hand and simply holds the time period provided for by statute in that case to be reasonable notice for funds to escheat to the State.

Counsel for defendant claims he was compelled to "make himself ridiculous in the eyes of the jury" because he was not informed of the claims against the railway.

It will soon be a year and a half since this case was tried and we have never seen a transcript of his argument to the jury nor was this made a part of the record for review by the Circuit Court. However, our recollection is that he in his argument touched upon all the claims of negligence hereinbefore mentioned. If this be the claim, the Court should have had the benefit of the argument in the record. His argument was not made a part of the record on appeal and yet defendant petitions this Court to hear an argument by him that he was handicapped. It couldn't possibly be reviewed for he did not attach enough importance to it to make it a part of the record.

As far as breaking down the elements of negligence by the Court in its charge the whole situation was what was important. This contention can best be answered by quoting from Justice Holmes in the case of *U. P. R.*

Co. v. Hadley, 38 S. Ct. 318, 246 U.S. 330, 62 L. Ed. 751, wherein the same complaint was made concerning the Court's charge and it is general in form and did not submit specific items of negligence. The Court speaking through Justice Holmes said:

> "On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's conduct, viewed as a whole, warranted a finding of neglect."

This is excellent law by the highest Court of this nation and set forth in the language of one of its most famous Justices. We respectfully submit that this case and the quotation cited therefrom is controlling of the situation and that without further authority this Petition of Chicago & North Western Railway Company herein should be denied.

To the same effect is *Blair v. Baltimore & O. R. Co.*, 323 U.S. 600, 89 L. Ed. 490, wherein the Court said:

> "The negligence of the employer may be determined by viewing its conduct as a whole. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others."

The claim of defendant that it was not informed of the claims of negligence and its contention that plaintiff's Answers to Interrogatories were "a series of platitudes" (Petition p. 5) is simply not correct. We have set forth

as Appendices A and B the Interrogatories of defendant to plaintiff and the Answers thereto. The Answers clearly and in detail set forth for defendant in advance of trial the claims by plaintiff of negligence on the part of the railway company.

Counsel for defendant also overlooks that there had been a three day trial and the issues were crystal clear to everybody by virtue of numerous pre-trial depositions, Interrogatories and testimony at the trial.

Petitioner also makes the statement that it is impossible to set forth an erroneous issue as having been submitted to the jury "because nothing has been submitted at all." This is absolutely untrue and the Court's charge covers 10 pages (R. 69-78) and instructs the jury to consider the charge as a whole, to determine the facts from the evidence, not to speculate as to possible answers where objections were sustained, if any attorney misstated evidence it should be disregarded, that a railway is liable for negligence of its officers, agents or employees or insufficiency due to its negligence in its cars, appliances, machinery, road beds, or other equipment, negligence was defined, proximate cause, burden of proof and all other required instructions on liability and damages. The charge was entirely adequate.

There is a completely new claim introduced in the Petition which has never before been urged; that is, the quotation from the Rules of Civil Procedure that the Court must rule upon requested instructions before argument to the jury. This was done and there was no claim made in the Circuit Court of Appeals or at any other time that the trial Judge did not rule upon the requested instructions. This is the first time that we were aware that there has ever been a claim that the trial Judge did not comply

completely with Rule 51 of the Rules of Civil Procedure. In fact, in the opinion of the Circuit Court (Petition p. 28) the Court said:

> "The defendant claims that the court failed to define the issues, but states that if the court had given the requested instructions, the issues would have been defined. The simple answer to this is that the court did give every requested instruction or the substance thereof except those which were not warranted by the record."

The Interrogatories had gone into great detail and there was a three-day trial with expert witnesses called by both plaintiff and defendant concerning the crab or crane. The only piece of equipment that was involved was the crab or crane and the Court, counsel, and jury were fully informed and well aware of this.

Had the argument of plaintiff's counsel been recorded it would show that all of the facts we refer to were discussed but in the final analysis we submitted for the jury's consideration that it was the plaintiff's honest belief that the cause of the accident was the failure of the boom operator to apply the brake for the boom had swung as it had never swung before and this seem then and seems now to be the most logical explanation of why the 1300 pound bridge timber swung in this way, and according to the railway foreman he had never seen one swing before to such an extent that "neither I nor any one else out there expected this timber to swing as it did" (R. 33).

THERE IS NO CONFLICT BETWEEN THE DECISION IN THIS CASE AND DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AND, IN FACT, THE QUESTION PRESENTED HAS TWICE BEEN RULED UPON BY THIS COURT.

CONCLUSION

WHEREFORE, Respondent respectfully moves the Court to deny the Petition for Certiorari.

Respectfully submitted,

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